

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA and)
GOVERNMENT OF THE VIRGIN)
ISLANDS,)
 Plaintiffs,)
v.)
))
FATHI YUSUF MOHAMMED YUSUF,)
WALEED MOHAMMED HAMED,)
WAHEED MOHAMMED HAMED,)
MAHER FATHI YUSUF, ISAM)
MOHAMAD YOUSUF, and UNITED)
CORPORATION, dba Plaza Extra)
Supermarkets,)
 Defendants.)
_____)

CRIM NO. 2005-0015

MEMORANDUM OPINION

Finch, J.

THIS MATTER comes before the Court on Defendants' Motion to Suppress the evidence obtained in the course of executing search warrants issued on October 23, 2001 on the basis that the search warrants are invalid. Defendants assert *inter alia* that the Magistrate Judge issued the search warrants relying on an affidavit [hereinafter "the Warrant Affidavit"] of a Special Agent of the Federal Bureau of Investigation [hereinafter "the FBI Special Agent" or "the Affiant"] which was made in reckless disregard for the truth.

I. Jurisprudence and Procedure under Franks v. Delaware

The Fourth Amendment shields against governmental intrusion in the guise of "unreasonable searches and seizures" and mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." The Supreme Court in Franks v. Delaware,

438 U.S. 154, 168 (1978) recognized that “[t]he requirement that a warrant not issue ‘but upon probable cause, supported by Oath or affirmation,’ would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile.” When the magistrate judge in issuing a warrant is misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth, suppression is an appropriate remedy. United States v. Leon, 468 U.S. 897, 923 (1984). Defendants seek that remedy in this case.

Because an affidavit is presumed to be valid, a defendant must make a “substantial preliminary showing” before the Court will hear evidence challenging the affiant’s veracity or commitment to unveiling and reporting the truth. Franks, 438 U.S. at 171. The defendant must show preliminarily that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and that the allegedly false statement is necessary to the finding of probable cause. Id. at 155-156. This requirement of a substantial preliminary showing is meant “to prevent the misuse of a veracity hearing for purposes of discovery or obstruction.” Id. at 170.

In Franks v. Delaware, the Supreme Court delved into what would constitute a “substantial preliminary showing” that a false statement, made with reckless disregard for the truth, was included in an affidavit:

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons.

Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.

Franks, 438 U.S. at 171.

Once a court finds that a defendant has made a substantial preliminary showing that the warrant affidavit contains a false statement that was made intentionally or with reckless disregard for its truth, the court “must turn to the next step of the reconstructive surgery, . . . excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether or not the ‘corrected’ affidavit would establish probable cause.” Wilson v. Russo, 212 F.3d 781, 789 (3d Cir. 2000). This “redaction process” is “a vehicle for determining whether there [is] a causal connection between the alleged misrepresentation . . . and the challenged search. If the information in the affidavit without the misrepresentation provided probable cause and the warrant should thus have been issued even had there been no scheme to deceive, there would be no causal connection between the scheme and the search and the search would not be tainted.” United States v. Calisto, 838 F.2d 711, 715 (3d Cir. 1988). Therefore, the Court must “set to one side” material that is subject of the alleged falsity or reckless disregard and only consider the remainder of the affidavit to determine anew the issue of probable cause. See United States v. Harvey, 2 F.3d 1318, 1324 (3d Cir. 1993).

If a court determines that a defendant has made the necessary substantial preliminary showing, the Fourth Amendment requires that a hearing be held. Franks, 438 U.S. at 172. At this hearing, the defendant must prove “by a preponderance of the evidence ‘that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by

the affiant in the warrant affidavit and [that] the allegedly false statement is necessary to the finding of probable cause.” United States v. Frost, 999 F.2d 737, 742 (3d Cir. 1993) (quoting Franks, 438 U.S. at 155-56). If the defendant meets this burden of proof, “the Fourth Amendment requires that . . . the fruits of the search [must be] excluded to the same extent as if probable cause was lacking on the face of the affidavit.” Frost, 999 F.2d at 743 (quoting Franks, 438 U.S. at 156); see also United States v. Brown, 3 F.3d 673, 676 (3d Cir. 1993) (stating that “the fruits of the search must be excluded unless the remaining content of the warrant is sufficient to establish probable cause.”).

Because, as a prerequisite to an evidentiary hearing, the defendant must have shown that the allegedly false statement is necessary to a finding of probable cause, the court must only address the first question at the hearing: Whether the defendant has proven by a preponderance of the evidence that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit. The second step, reviewing the warrant affidavit for probable cause with the offending portions redacted, need not be repeated.

II. Defendants’ Substantial Preliminary Showing

A. Whether Defendants Have Preliminarily Shown that the FBI Special Agent Made False Statements with Reckless Disregard for the Truth.

Whether Defendants have made a substantial preliminary showing that the FBI Special Agent made false statements with reckless disregard for the truth in the Warrant Affidavit requires a two-part inquiry. First, the Court must assess whether Defendants have made a substantial showing that the Warrant Affidavit contains false statements. Then the Court must determine whether Defendants have made a substantial showing that such statements were made

with reckless disregard for the truth.

Defendants contend and the Government concedes that Paragraphs 23 and 24 contain false statements. Paragraph 23 of the FBI Special Agent's affidavit in support of the search warrants states in its entirety:

According to my examination of the records of the Virgin Island Bureau of Internal Revenue (IRB), it appears that United Corporation d/b/a Plaza Extra under-reported its gross receipts to the IRB in 1998 through 2000, in connection with reports filed for the 4% Gross Receipts Tax imposed by the Government of the Virgin Islands pursuant to Title 33 VIC Sections 43 and 44. That is, United Corp reported approximately \$270,000 in gross receipts during the year 1998. In contrast, in its 1998 corporate income tax return, United Corp. reported approximately \$41 million in gross receipts. For 1999 and 2000, respectively, United Corp reported approximately \$3.7 million and \$8.3 million in gross receipts in reports filed for the 4% Gross Receipts Tax. In contrast, in financial statements furnished to The Bank of Nova Scotia in order to obtain and later meet its obligations under a \$2 million loan agreement signed by Fathi Yusuf in February 2000, United Corp. showed gross receipts of approximately \$47 million and \$54 million for 1999 and 2000, respectively. This would indicate that United Corp. either (1) under-reported its gross receipts to the IRB and therefore owes in excess of \$ 3 million in gross receipts taxes for 1999-2000, which it did not reveal to the Bank of Nova Scotia, or (2) substantially inflated its revenues for 1999-2000 in connection with its loan agreement, or both. According to the IRB, United Corporation did not file a corporate income tax return for 1999 or 2000, obtained extensions and still have not filed those returns.

The Government admits that United Corporation reported \$39,120,091 in gross receipts tax return during the year 1998, not \$270,000 as stated in the affidavit. Defendants have submitted the actual gross receipt tax returns for United Corporation for 1999 and for 2000 which show that United Corporation reported its gross receipts at \$43,967,171 million for 1999 and \$ 49,211,159 million for 2000, rather than the \$3.7 million and \$8.3 million attributed to 1999 and 2000 in the Warrant Affidavit. Defendants also have provided the date-stamped copy of Untied Corporation's corporate income tax return for 1999 and 2000, indicating that they had been filed long before the FBI Special made out this affidavit. Finally, the Government indicates

that the FBI Special Agent obtained computer printouts summarizing the gross receipts tax returns, which renders his reference to his “examination of the records of the Virgin Island Bureau of Internal Revenue (IRB)” misleading, if not false.

Paragraph 24 which accuses United Corporation of violating “Title 33 VIC Sections 43, 44, and 53,” “18 U.S.C. 1341 (Mail Fraud) and 1343 (Wire Fraud)” and “ 18 U.S.C.1957 (money laundering)” is premised on the false statements of paragraph 23.¹ Therefore it is false in its entirety.

The Courts finds that Defendants have made a substantial preliminary showing that the Warrant Affidavit contains false statements in paragraphs 23 and 24. Next, the Court addresses whether Defendants have made a substantial showing that the false statements were made in reckless disregard for the truth.

“An assertion is made with reckless disregard when viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to

¹ Paragraph 24 provides in its entirety:

The preparation and submission of a false gross receipts tax return to the VIBIR is a violation of Title 33 VIC Sections 43, 44, and 53. Furthermore, by the submission of false financial statements to The Bank of Nova Scotia, wherein United Corp. either grossly overstated its revenues, or failed to report a latent Gross Receipts Tax liability of \$3 million, United Corporation committed a fraud on a bank by creating the misimpression that it was more creditworthy than it was in reality. According to officers of the Bank of Nova Scotia, a loan of this magnitude requires independent review and express approval of the bank’s headquarters in Toronto. The loan package was conveyed to Toronto by Federal Express. During the review process, there were communications between the bank office in St. Thomas and the headquarters in Toronto by e-mail and fax. The foreseeable use of interstate telephone facilities in fax and e-mail and the use of FEDEX communications in furtherance of the execution of a scheme to defraud constitutes violation of 18 U.S.C. 1341 (Mail Fraud) and 1343 (Wire Fraud). Any financial transactions in excess of \$10,000 with the \$2 million fraud proceeds are a violation of 18 U.S.C.1957 (money laundering).

doubt the accuracy of the information he reported.” Wilson, 212 F.3d at 788 (quotation omitted).

“In applying the reckless disregard test to assertions, [the Supreme Court has] borrowed from the free speech arena and equated reckless disregard for the truth with a ‘high degree of awareness of [the statements’] probable falsity.” Id. (quoting Garrison v. Louisiana, 379 U.S. 64, 74

(1964)). The Government submits a second affidavit of the FBI Special Agent, who swore to the Warrant Affidavit, with which it attempts to convince the Court that the gross inaccuracies of paragraph 23, which led to the harsh accusation of paragraph 24, were not made recklessly.

The FBI Special Agent states that when investigating agents noted the significant discrepancies in the records of the Virgin Islands Bureau of Internal Revenue (BIR), the agents returned to the BIR to obtain an explanation. The BIR was not able to provide a reason for the discrepancies.

The Affiant also avers that he personally returned to the BIR offices on multiple occasions in an attempt to determine a reason for the large differences. He states that on each visit, he was assured that the gross receipt tax information provided for United Corporation was complete. Rather than convince the Court that the FBI Special Agent included false statements in the affidavit believing them to be true, this second affidavit persuades the Court that he included incorrect figures with significant doubts as to their accuracy, and that he never revealed his concerns to the Magistrate Judge.

In further support of the Affiant’s recklessness with regard to the truth of the information relayed to the Magistrate Judge in support of the search warrants, Defendants point to paragraph 33, which states: “During September 2001, the FBI received information from CS#3 that s/he was told by Fathi Yusuf, during a conversation concerning Plaza Extra in 1980-81, ‘Any man who can’t take out \$1 million a year in cash from a business like this is a fool.’” Defendants

indicate that Plaza Extra did not open its doors until 1986. This fact is so readily and publicly available that it tends to show that the FBI Special Agent was so reckless in preparing the affidavit that he incorporated hearsay that he should have completely disregarded as unreliable.

In addition to the FBI Special Agent's own second affidavit indicating that he, himself, was concerned about the truth of what he had stated in his affidavit in support of the search warrants, his recklessness in including in paragraph 33 an absurd statement that someone relayed to him further supports the Court's finding that Defendants have made a preliminary showing that a Franks hearing is warranted.

B. Whether After Striking Paragraphs 23 and 24, the Remainder of the Affidavit Provides Probable Cause.

In deciding whether to hold a Franks hearing, the Court must review the remainder of the Warrant Affidavit to determine whether it would have established probable cause for the Magistrate Judge to have issued the search warrants absent the offending paragraphs – paragraphs 23 and 24.

Rule 41(c) of the Federal Rules of Criminal Procedure states that a warrant may issue upon an affidavit sworn to before a federal magistrate if the magistrate is satisfied that the affidavit is supported by probable cause. “Probable cause exists where ‘the facts and circumstances within their (the officers’) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” Brinegar v. United States, 338 U.S. 160, 175-176 (1949) (quoting Carroll v. United States, 267 U.S. 132, 161 (1925)).

Although proof beyond a reasonable doubt of criminal activity is not required, more than

“a bare suspicion” is required. Id. at 175. Suspicion is not enough to establish probable cause for issuance of a search warrant. United States v. Harris, 403 U.S. 573, 597 (1971). “[P]robable cause which will justify the issuance of a search warrant is less than certainty or proof, but more than suspicion or possibility, the test being whether the allegations of the supporting affidavit warrant a prudent and cautious man in believing that the alleged offense has been committed.” United States ex rel. Campbell v. Rundle, 327 F.2d 153, 163 (3d Cir. 1964) (quotation omitted).

“[A] warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause.” Franks, 438 U.S. at 165. The affidavit, “read as a whole in a realistic and common sense manner,” must “allege specific facts and circumstances” showing that “the items sought to be seized are associated with the crime and located in the place indicated.” United States v. Newsom, 402 F.3d 780, 782 (7th Cir. 2005). “It is fundamental that the law of probable cause has been developed in an attempt to prevent the issuance of a search warrant on the basis of vague and uncertain information.” United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972).

The probable cause “to justify the issuance of a search warrant must exist at the time the warrant is issued.” United States v. Harris, 482 F.2d 1115, 1119 (3d Cir. 1973). In other words, the observations supporting probable cause must not be stale. “It is not enough that the items may have been at the specified location at some time in the past – there must be probable cause to believe that they are there when the warrant issues.” United States v. Tehfe, 722 F.2d 1114, 1119 (3d Cir. 1983).

“The question of the staleness of probable cause depends more on the nature of the unlawful activity alleged in the affidavit than the dates and times specified therein.” Harris, 482

F.2d at 1119. Age alone is not the only criteria for judging the timeliness of a warrant application:

Age of the information supporting a warrant application is a factor in determining probable cause. If too old, the information is stale, and probable cause may no longer exist. Age alone, however, does not determine staleness. The determination of probable cause is not merely an exercise in counting the days or even months between the facts relied on and the issuance of the warrant. Rather, we must also examine the nature of the crime and the type of evidence.

Harvey, 2 F.3d at 1322 (citations and quotation omitted). Timeliness must be determined based on the circumstances of each case. “The likelihood that the evidence sought is still in place depends on a number of variables, such as the nature of the crime, of the criminal, of the thing to be seized, and of the place to be searched.” Tehfe, 722 F.2d at 1119.

For example, “when an activity is of a protracted and continuous nature the passage of time becomes less significant.” Id. (quotation omitted). On the other hand, “[w]here the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time.” Harris, 482 F.2d at 1119.

Although the affidavit supporting a search warrant may be based upon hearsay, Jones v. United States, 362 U.S. 257, 269 (1960), the affidavit should contain information explaining why the officers believe the supporting information to be reliable. See United States v. Leon, 468 U.S. 897, 904-05 (1984). A warrant should only be issued when, given all the circumstances set forth in the affidavit, “including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Harvey, 2 F.3d at 1321-22 (quoting Illinois v. Gates, 462 U.S. 213, 238-39 (1983)).

Defendants favor a paragraph by paragraph review of the Warrant Affidavit to determine

whether any individual paragraph or group of paragraphs of the affidavit supplies probable cause. The Government insists that the Court is required to read the Warrant Affidavit as a whole.

The Court will examine the Warrant Affidavit under the totality of the circumstances test to determine whether probable cause exists. See Gates, 462 U.S. at 238. “Probable cause exists to support the issuance of a search warrant if, based on a totality of the circumstances, ‘there is a fair probability that contraband or evidence of a crime will be found in a particular place.’” Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir. 1997) (quoting Gates, 462 U.S. at 238). Direct evidence need not link criminal activity to the place to be search; it is enough that an accumulation of circumstantial evidence indicates a fair probability of the presence of contraband at the location to be searched. United States v. Burton, 288 F.3d 91, 103 (3d Cir. 2002).

Thus, the Court considers whether the Warrant Affidavit as a whole, based on the totality of the circumstances, but excluding the false statements of paragraphs 23 and 24, presents sufficient evidence for the Magistrate Judge to have found probable cause that any of the crimes the Affiant alleges in the Warrant Affidavit were being or had been committed and that evidence of any of such crimes would be found at the locations and on the people indicated in the warrants. The crimes at issue, specified in paragraph 36 of the Warrant Affidavit, in the order in which they are discussed below, are (1) mail fraud and wire fraud; (2) food stamp fraud; (3) alien smuggling; (4) violation of the International and Emergency Economic Powers Act; (5) failure to report exporting of monetary Instruments; and (6) Money Laundering, Conspiracy to Commit Money Laundering and Conspiracy.

1. Mail Fraud and Wire Fraud

The only indication that United Corporation was involved in mail fraud or wire fraud is in paragraph 24, which is based on the false statements in paragraph 23. There is no other basis, considering the Warrant Affidavit as a whole, to support a finding that any of the Defendants had committed or were committing mail fraud or wire fraud.

2. Food Stamp Fraud

Of the entire affidavit, only one paragraph addresses food stamp fraud – paragraph 31:

In 2001, the FBI received information from a reliable confidential source who is in a position to know and whose information has proven to be accurate many times in the past (hereinafter “CS #2”) that Waheed Hamed at Plaza Extra has illegally purchased food stamps from stores that are owned by persons of Middle Eastern descent and that are not authorized to collect reimbursement for food stamps. Further, according to CS #2, after Plaza Extra has purchased the food stamps, it has collected improper reimbursement for those food stamps in violation of 7 U.S.C. 2024.

This paragraph fails to establish probable cause because it does not provide the time frame within which this food stamp fraud occurred and also lacks particularity. It does not indicate the dates of the purchases, the dates when reimbursement was applied for or collected, or the frequency or continuing nature of this crime. Thus, a reasonable person could not conclude that the information is timely.

The Affiant does not specify the stores from which Waheed Hamed was purchasing food stamps or indicate the number of stores involved. The Warrant Affidavit provides no details concerning the amount or number of purchases or the amount of reimbursements. Finally, paragraph 31 does not state the basis of the confidential source’s knowledge, nor does it indicate that any efforts were made to corroborate the information supplied.

Taking the Warrant Affidavit as a whole, the Court concludes that the Affiant has failed to establish probable cause that any of the Defendants were involved in food stamp fraud and that evidence of the food stamp fraud would be found in any of the locations or on any of the people to be searched.

3. Alien Smuggling

Paragraphs 14-15 of the Warrant Affidavit concern employment of illegal aliens by Plaza Extra. Paragraph 14 states that in 1995, the Immigration and Naturalization Service (INS) was informed that Plaza Extra in St. Thomas was employing a large number of illegal aliens. In 1997, according to paragraph 15, the INS charged Plaza Extra with failing to complete forms verifying its employees' citizenship. Plaza Extra paid a fine of \$20,000 in settlement of that case.

Paragraph 16 and 17 deal more particularly with alien smuggling:

16. In 1999, INS commenced investigation into allegations that Plaza Extra was involved in smuggling Middle Eastern nationals into the US from the island of St. Maarten, Netherlands Antilles (NA). Further, Plaza Extra was known to employ illegal Middle Eastern aliens at its supermarkets on weekends, at nights, and at odd hours of the day. Plaza Extra was reported to have paid these illegal employees in cash, kept handwritten logs or notes concerning these illegal employees separate from the regular employee records, and made no deductions or payments for payroll taxes, in order to shield both the illegal aliens and Plaza Extra from detection by law enforcement authorities, in violation of 8 U.S.C. 1324 and 1327 (Alien Smuggling Offenses).

17. On August 10, 1999, officers of INS executed federal search warrants at two Plaza Extra supermarkets, one in St. Thomas and the other at the United Shopping Plaza in St. Croix. They found three illegal Middle Eastern aliens working at the St. Thomas store. Prior to executing the search warrant, INS agents asked Fathi Yusuf if there were any illegal aliens employed at the St. Thomas store, and he said there were none. After the three illegal aliens were found working in the store, Yusuf admitted to INS that he was aware that they were illegally employed at Plaza Extra. Fathi Yusuf, one of the owners of Plaza

Extra, and five other co-conspirators were charged with conspiracy and alien smuggling offenses relating to two other illegal aliens who had previously been arrested while trying to travel to the continental United States. One of the alien smuggling offenses was that Fathi Yusuf encouraged and induced illegal aliens to reside in the United States by employing them at Plaza Extra, in violation of 8 U.S.C.1324. In 2001 Fathi Yusuf pleaded guilty to three counts of 8 U.S.C.1324a (Unlawful Employment of Unauthorized Aliens); he was sentenced on September 19, 2001, to six months of house confinement.

The facts that the owner of United Corporation did not certify the citizenship of its employees and hired illegal aliens to encourage them to reside in the United States would provide probable cause that criminal activity was occurring, if the information were current or if there were any evidence that such conduct was ongoing. The Warrant Affidavit was signed more than two years after the most recent criminal activities mentioned in paragraphs 14 through 17, the only portions of the Warrant Affidavit pertaining to alien smuggling. Moreover, Defendant Fathi Yusuf was aware not only that United Corporation's employment of illegal aliens had been detected, and thus likely would be detected if it continued, but also that he would be personally punished for employing illegal aliens. The Affiant gave no indication that Fathi Yusuf's sentence on September 19, 2001 had not deterred him from continuing hiring illegal aliens, and that such criminal conduct was ongoing. The fact that Fathi Yusuf has a criminal record does not suffice, in and of itself, to show probable cause. See Beck v. Ohio, 379 U.S. 89, 96 (1964). To find that such fact constitutes probable cause "would be to hold that anyone with a previous criminal record could be arrested at will." Id. at 97.

In sum, the information in paragraphs 14-17 relating to the employment and smuggling of illegal aliens is not timely enough to show a fair probability that alien smuggling had been or was being committed and that evidence of such crime would be found in the locations or on the people specified in the Warrant Affidavit.

4. Violation of the International Emergency Economic Powers Act

After reviewing the entire affidavit, the Court notes that only two paragraphs assert violations of the International Emergency Economic Powers Act. In paragraph 32, the FBI Special Agent avers:

During September 2001, the FBI received information from a reliable confidential source, who is a good citizen in the Virgin Islands with no criminal record and has agreed to testify if necessary (hereinafter “CS#3”) that s/he was told by Waleed Hamed, a manager employed at Plaza Extra, that he (Hamed) had arranged to smuggle more than \$2 million US currency to the Middle East to Saddam Hussein during the time of the Persian Gulf War, which occurred in 1990. CS#3 said s/he was told by Hamed that he had done this because Hussein was “the great liberator” who would free the Middle East of the US and destroy Israel. Hamed said the cash had been secreted in the long robes of Muslim women. This smuggling of cash overseas was in violation of 31 U.S.C. 5316 and 5322 (Failure to Report Exporting of Monetary Instruments) and 50 U.S.C. 1701, et seq. (International Emergency Economic Powers Act).

According to the FBI Special Agent, as reported in paragraph 35 of the Warrant Affidavit, an anonymous caller indicated that an owner of Plaza Extra was similarly planning to send money to another war-torn area – Afghanistan:

On October 12, 2001 an anonymous caller telephoned the FBI in San Juan, Puerto Rico and stated that the owner of Plaza Extra in St. Thomas had contacted Russell Robinson, a pilot at Clint Aero in St. Thomas, to transport two separate shipments of U.S. currency – \$900,000 and \$1.2 million – by airplane from St. Thomas to St. Maarten, and that the money was destined for Afghanistan. [a violation of 50 U.S.C. 1701, et seq. (International Emergency Economic Powers Act)] The caller indicated that both the owner of Plaza Extra and the pilot Russell Robinson had been convicted of alien smuggling in the past.
...

Paragraph 32 describes conduct that would violate the International Emergency Economic Powers Act, if true. The reason that paragraph 32 fails to establish probable cause necessary to support a search warrant is that it is both stale and does not address whether

evidence of the crime would be likely to be found at the places or on the people to be searched.

Paragraph 35 might tend to indicate the crime of sending money to sensitive areas is ongoing, if it did not suffer with regard to its reliability. Although information from an anonymous caller can give probable cause for a search, it must have some “indicia of reliability.” Gates, 462 U.S. at 233. Here, the caller does not indicate his or her basis of knowledge. The caller does not indicate when the contact occurred. The caller states that the owner of Plaza Extra has been convicted of alien smuggling which is untrue and casts doubt on the caller’s credibility. The caller failed to provide the FBI with sufficient information for the FBI to independently investigate the accuracy of the information. Indeed, there is no indication in the affidavit that any effort was made to corroborate the information received from the call. See id. at 241 (stating that the Supreme Court’s decisions applying the totality of the circumstances analysis “have consistently recognized the value of corroboration of details of an informant’s tip by independent police work”). Therefore, the anonymous caller’s allegations can be given little or no weight in the probable cause calculus.

Thus, reading the Warrant Affidavit as a whole, and considering the totality of the circumstances, paragraph 35 cannot resolve the staleness problem with paragraph 32 by showing continuing criminal conduct, because it is not sufficiently trustworthy. Moreover, there is no indication of the types of evidence that the FBI Special Agent expected would be found in the any of the areas that the search warrants covered that would be related to this crime.

5. Failure to Report Exporting of Monetary Instruments

Paragraphs 25, 32, 34, and 35 relate to transferring monetary instruments from within the United States to outside the United States. Paragraph 25 states that a group of merchants, “all

using the last name Youssef or Yousuf, including Fathi Yusuf,” made cash deposits in St. Maarten in excess of \$2.2 million during 2000, which “appeared to far exceed the legitimate cash proceeds” of the retail sales of these merchant’s businesses in St. Maarten. According to a “respected foreign service agency” the cash deposits “appeared to involve money laundering of US currency.”

Paragraph 25 lacks sufficient specificity to establish probable cause. It does not particularly identify the foreign service agency, the merchants, the merchants’ businesses, or the amounts of cash deposited by the various merchants. Nor does it postulate the extent to which the amounts of cash deposited exceeds that which could have been derived from legitimate retail sales of the merchants’ businesses. Finally, it does not provide any connection between the cash deposits and the locations and people for which the search warrants were sought.

As discussed above, paragraph 32 concerning the exporting of \$2 million to the Middle East in 1990, is too untimely to indicate a fair probability that evidence of this crime would be found in any of the locations to be searched, and does not support a finding of probable cause that a crime has been or is being committed, absent other trustworthy information that similar conduct is ongoing.

Paragraphs 34 and 35 may have been included to show that the exporting of monetary instruments is continuing, but each suffers from its own infirmities. The lack of any indicia of reliability in paragraph 35 was addressed in analyzing whether the Warrant Affidavit makes a probable cause showing that the International Emergency Economic Powers Act was violated. Paragraph 34 is more reliable as to its factual recitation, stating in its entirety:

In 2001, FS#1 told the FBI that in 2001 Najeh Yusuf, son of Fathi Yusuf and part-owner of United Corp., and his wife traveled by plane from San Juan to

Paris. Once in Paris, Najeh Yusuf departed immediately on a flight to Atlanta, Georgia, and Najeh's wife departed on a flight to Amman, Jordan. The unusual itinerary of Najeh Yusuf, going from San Juan to Atlanta via Paris, and his wife continuing on to Jordan, appears to be consistent with the behavior of a cash courier, in violation of 31 U.S.C. 5316 and 5322 (Failure to Report Exporting of Monetary Instruments).

The Achilles heel of paragraph 34, however, is that the connection between the travel arrangement described and exporting cash is no more than a product of the FBI Special Agent's suspicion and speculation. The FBI Special Agent's unsupported and conclusory belief, in and of itself, is insufficient to establish probable cause. Notably lacking is any indication of whether evidence of this crime would likely be found at any of the locations or on any of the persons subjected to being searched under the search warrants.

Considering 25, 32, 34, and 35 together, the only paragraphs of the Warrant Affidavit, that remotely relate to exporting monetary instruments, the Court finds that the Warrant Affidavit fails to establish probable cause that Defendant were failing to report the exporting of monetary instruments, or that evidence of such crime would be found in any of the locations or on any of the people named in the search warrants.

6. Money Laundering, Conspiracy to Commit Money Laundering and Conspiracy

A significant portion of the Warrant Affidavit is directed toward money laundering and conspiracy to commit money laundering. Paragraph 18 indicates that in August 1999, there was an estimated three to seven million dollars inside a safe on the second floor of the St. Thomas Plaza Extra store. The results of additional investigation, reported in paragraph 19, showed that United Corporation did not make such a large currency deposits in 1999.

These two facts together apparently led the Affiant to suspect that United Corporation

was not depositing cash into its bank accounts so that it could avoid paying taxes on such cash and could transfer it out of the United States. Absent the facts alleged in paragraph 23 that tended to show that United Corporation was not paying its gross receipt taxes, however, there is no basis for drawing an inference from the large amount of cash in the safe that United Corporation was laundering money, rather than holding the money for some other legal purpose – such as paying vendors or cashing customer’s and employee’s checks. Indeed, the analysis of United Corporation’s cash deposits for the period of January 2000 through August 2001, described in paragraph 20, showed excessive cash deposits during 19 weeks. If anything, this tends to show that the money viewed in the safe in 1999 was periodically deposited between January 2000 and August 2001, controverting the Affiant’s money laundering insinuation.

Paragraph 21 discusses the deposit of more than \$3 million for the week ending April 21, 2001, with \$1.94 million deposited using seven deposit slips marked “Cash (Stockholder’s Investment).” Paragraph 22 explains that United Corporation paid more than \$1.9 million in two checks to Hamdan Diamond Corp. with one of the checks marked “loan payment” and the other “partial payment.” The checks were deposited in Hamdan Diamond Corp.’s Merrill Lynch account. Reading paragraphs 20, 21, and 22 together lead to the inference that the stockholder’s of United Corporation had borrowed money from Hamdan Diamond Corp., which they were repaying. Without paragraph 23, there is no indication that such transfer of funds involved any criminal activity.

If paragraph 25, regarding more than \$2.2 million cash being deposited in St. Maarten, were more specific concerning the amount attributable to Fathi Yusuf, it would show a fair probability that a crime had been committed. However, the information is vague, as previously

discussed. The Warrant Affidavit does not indicate what evidence would be likely to be found in the locations to be searched that would prove or disprove that Fathi Yusuf had deposited money in St. Maarten as part of a money laundering scheme. Again, absent paragraph 23, there is no evidence that United Corporation had any motivation to hide its currency.

Activities of Bashir Yashim, who is not alleged to be affiliated in any manner with United Corporation or the other Defendants, are reviewed in paragraphs 26-30. Yasim, according to a confidential informant, traffics in narcotics, and is involved in establishing beauty salons to launder the proceeds of his narcotics business. The only connection between Yasim and the Defendants is that described in paragraph 29: “Yasim has been in direct contact with the management of Plaza Extra in order to set up a similar operation in St. Croix.”

The link between Yasim’s activities and the Defendants is too nebulous for a reasonable person to draw any inferences of criminal conduct on the part of the Defendants. The Court is at a loss as to how Yasim’s unilateral contact with the management of Plaza Extra implicates Defendants in any criminal activity and why evidence of such activity would likely to be found in any of the locations or on any of the people for which the search warrants were obtained.

Finally, the Affiant states:

33. During September 2001, the FBI received information from CS#3 that s/he was told by Fathi Yusuf, during a conversation concerning Plaza Extra in 1980-1981, “Any man who can’t take out \$1 million a year in cash from a business like this is a fool.”

Even if Plaza Extra had existed in 1980 and 1981, and Fathi Yusuf’s statement were not twenty years old, rendering it irremediably stale, the statement certainly was not an admission by Fathi Yusuf that United Corporation was hiding its income through money laundering to avoid paying its taxes.

The Court has reviewing the Warrant Affidavit as a whole, giving particular attention to the many paragraphs that were included to imply that Defendants were engaged in money laundering and a conspiracy to commit money laundering. With the excision of the paragraphs describing Defendants' evasion of taxes, the Warrant Affidavit fails to demonstrate a fair probability that Defendants were engaged in money laundering.

Not until paragraph 36 does the Affiant attempt to link any of the criminal conduct recited in the preceding paragraphs to the locations to be searched. In paragraph 36, the FBI Special Agent states:

36. Based upon the above, I have probable cause to believe, and I do believe, that property constituting evidence of the federal crimes of 18 U.S.C. Sections 1956 and 1957 (Money Laundering and Conspiracy to Commit Money Laundering), 31 U.S.C. 5316 and 5322 (Failure to Report Exporting of Monetary Instruments), 18 U.S.C. 1341 (Mail Fraud), 18 U.S.C. 1343 (Wire Fraud), 8 U.S.C. 1324 (Alien Smuggling), 7 U.S.C. 2024. (Food Stamp Fraud); 50 U.S.C. 1701, et seq. (International Emergency Economic Powers Act), and 18 U.S.C. 371 (Conspiracy) is present within the territory of St. Thomas, USVI, and the locations set forth in Exhibit "A."

In United States v. Newman, 685 F.2d 90, 92 (3d Cir. 1982), the Third Circuit criticized a similarly conclusory statement, cautioning that "[t]he conclusory statement of the affiant that based on his experience he had reason to believe that ammunition and 'other fruits and instrumentalities of the ... crime' would be found in the office cannot serve as a substitute for a demonstration of probable cause in the factual recitations of the affidavit." Paragraph 36 is inadequate to connect the activities described in the preceding paragraphs of the Warrant Affidavit to any of the locations or persons mentioned in Exhibit "A."

After reviewing each of the crimes for which the Warrant Affidavit was intended to supply probable cause, the Court finds that the Warrant Affidavit is woefully deficient, absent

the statements in paragraphs 23 and 24. The Warrant Affidavit does not show that there is a fair probability that Defendants committed any of the crimes in issue or that the evidence of such crimes would be found in the locations or on the people subject to the search warrants.

Thus, Defendants have made a substantial preliminary showing, as required under Franks, that (1) false statements were included by the FBI Special Agent in the Warrant Affidavit with reckless disregard for the truth and (2) the false statements are necessary to a finding of probable cause. Therefore, Defendants are entitled to a hearing to demonstrate by a preponderance of the evidence that the Warrant Affidavit contains false statements made with reckless disregard for the truth. See Franks, 438 U.S. at 155-156.

III. Whether Defendants Proved by a Preponderance that False Statements were Made in Reckless Disregard of the Truth.

The Government concedes that the material statements of paragraph 23 and 24 concerning the amount of gross receipts taxes reported and paid by United Corporation, d/b/a Plaza Extra, are false, and that United Corporation did, in fact, file its 1999 and 2000 corporate tax returns. Thus, even without considering the affidavit Defendants submitted to meet their burden, the Court finds that the statements concerning the monthly gross receipt taxes and the filing of the annual corporate tax returns included in paragraphs 23 and 24 are false by a preponderance of the evidence.

To prove that such statements were made in reckless disregard of the truth, Defendants examined the FBI Special Agent who made such statements. “[A] defendant may attack the issuance of a warrant if based on untruthful information.” Harvey, 2 F.3d 1318, 1323 (3d Cir. 1993). “This does not mean “truthful” in the sense that every fact recited in the warrant affidavit

is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily.” Id. (quoting Franks, 438 U.S. at 165). However, an affidavit must “be ‘truthful’ in the sense that the information put forth is believed or appropriately accepted by the affiant as true.” Franks, 438 U.S. at 164-65. “To succeed in attacking a warrant, a defendant must come forward with ‘allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.’” Harvey, 2 F.3d at 1323 (quoting Franks, 438 U.S. at 171).

The FBI Special Agent indicated that the Government had obtained an *ex parte* Order requiring the BIR to provide the FBI with tax documents concerning United Corporation. The BIR gave the FBI a copy of United Corporations’s corporate tax return, but only computer printouts of the monthly gross receipts reported. The Affiant noted a huge difference between the gross receipts shown on the computer printouts and the gross receipts indicated on the corporate tax return. Months when United Corporation reported no gross receipts, followed by months in which gross receipts were reported in the range of millions of dollars, the FBI Special Agent found particularly troubling.

In attempts to reconcile these figures, the FBI Special Agent and other officers made repeated visits to the BIR to request that additional documents be provided in compliance with the *ex parte* Order. The FBI Special Agent visited the BIR on five occasions between October 1 and October 19, 2001, because he felt that the BIR was withholding many documents. He even met with the BIR’s director. Each time, the BIR failed to produce any additional documents and maintained that the computer printout was accurate.

Despite being unsatisfied with BIR's response concerning the obvious differences between the corporate tax return and the monthly gross receipt tax returns, as summarized in the computer printout, the FBI Special Agent did not seek a further court order or attempt to subpoena the actual gross receipt tax returns from the taxpayers or their accountants or cancelled checks from Defendants' banks. The FBI Special Agent testified that he did not know what steps had been taken to prepare the computer printout or whether the printout was reliable, having had no prior experience relating to such printouts. Although he never reviewed the monthly gross receipt tax returns and the BIR never provided him with any further documents, the FBI Special Agent testified that he satisfied himself that the computer printout was accurate.

Without verifying the suspect data from the BIR, the FBI Special Agent signed the Warrant Affidavit. In the Warrant Affidavit, the FBI Special Agent did not mention entertaining any uncertainty concerning the figures that he attested to in paragraph 23. Rather he sought to obtain documents via the requested search warrants to prove or disprove the information provided by the BIR.

To bolster their evidence that the FBI Special Agent had taken a reckless approach to preparing the Warrant Affidavit, Defendants questioned the FBI Special Agent about paragraph 34, which discusses Naher Yusuf's and his wife's travel itineraries. The FBI Special Agent stated that he did not recall having ever attempted to independently corroborate the travel information.

As to paragraph 33, concerning Fathi Yusuf's statements about Plaza Extra, supposedly made in 1980-81, years before Plaza Extra's existence, the FBI Special Agent explained that the proper time frame was 1990 to 1991 and that the discrepancies was caused by a typographical

error. Finally, the FBI Special Agent admitted that he had not made any effort to further investigate the information in paragraph 32 regarding food stamp fraud, and that he did not recall taking any steps to corroborate the contents of paragraph 31.

After observing the FBI Special Agent testify in response to Defendants' questions, and reviewing the limited documents that the FBI Special Agent had before him when he swore to the contents of the Warrant Affidavit, the Court concludes that Defendants have satisfied their burden. Defendants have shown by a preponderance of the evidence that the FBI Special Agent included material false statements in the Warrant Affidavit with reckless disregard for the truth.

IV. Conclusion

Defendants made the requisite substantial preliminary showing for a Franks hearing. At the Franks hearing, Defendants showed by a preponderance of the evidence that material statements in the Warrant Affidavit were recklessly untruthful. Absent the paragraphs of the Warrant Affidavit that contain these material false statements, the Warrant Affidavit does not provide probable cause for the issuance of any of the search warrants. Accordingly, the Court will employ the exclusionary principle and suppress all evidence obtained as a result of executing the search warrants.

ENTER:

DATED: June 16, 2005

RAYMOND L. FINCH
CHIEF JUDGE

A T T E S T:
Wilfredo F. Morales

Clerk of Court

by:

Deputy Clerk

cc:

Magistrate Judge Geoffrey W. Barnard

Nelson L. Jones, AUSA

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Derek M. Hodge, Esq.

John K. Dema, Esq.

Randall Andreozzi, Esq.

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA and)
GOVERNMENT OF THE VIRGIN)
ISLANDS,)
 Plaintiffs,)
v.)
))
FATHI YUSUF MOHAMMED YUSUF,)
WALEED MOHAMMED HAMED,)
WAHEED MOHAMMED HAMED,)
MAHER FATHI YUSUF, ISAM)
MOHAMAD YOUSUF, and UNITED)
CORPORATION, dba Plaza Extra)
Supermarkets,)
 Defendants.)
_____)

CRIM NO. 2005-0015

ORDER

THIS MATTER comes before the Court on Defendants' Motion to Suppress the evidence obtained in the course of executing search warrants issued on October 23, 2001 on the basis that the search warrants are invalid. Defendants assert *inter alia* that the Magistrate Judge issued the search warrants relying on an affidavit [hereinafter "the Warrant Affidavit"] of a Special Agent of the Federal Bureau of Investigation which was made in reckless disregard for the truth.

As discussed in the accompanying Memorandum Opinion, Defendants made the requisite substantial preliminary showing for a Franks hearing. At the Franks hearing, Defendants showed by a preponderance of the evidence that material statements in the Warrant Affidavit were recklessly untruthful. Absent the paragraphs of the Warrant Affidavit that contain these material false statements, the Warrant Affidavit does not provide probable cause for the issuance of any of the search warrants. Therefore, the Court will employ the exclusionary principle. Accordingly, it is hereby

ORDERED that the Motion to Suppress is **GRANTED**; and
that all the evidence obtained as a result of executing the search warrants is
SUPPRESSED.

ENTER:

DATED: June 16, 2005

RAYMOND L. FINCH
CHIEF JUDGE

A T T E S T:
Wilfredo F. Morales
Clerk of Court

by: _____
Deputy Clerk
cc: Magistrate Judge Geoffrey W. Barnard
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